

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

61348

FILE: B-185177

DATE: August 17, 1976

MATTER OF: Robert P. Maier, Inc.

98677

DIGEST:

Prior decision concluding that valid sales contracts were created by telephonic offer and acceptance is affirmed. Facts relied upon in earlier decision are supported by record and conclusions of law have not been shown to be erroneous.

Robert P. Maier, Inc. (Maier) requests that our Office reconsider the decision in Robert P. Maier, Inc., B-185177, March 1, 1976. In response to a General Services Administration (GSA) request for an advance decision we held that in the circumstances described, contracts were created by the oral communications between Maier and the Government.

The record indicated that on June 28, 1973, GSA issued a solicitation for offers for the sale of crude natural rubber. Between November 2, 1973, and May 6, 1974, Maier telephonically offered to purchase an aggregate amount of 2,100 long tons of rubber from GSA. A GSA contracting officer accepted the offers by telephone and recorded the sales in GSA's Daily Record of Rubber Sales. When GSA attempted to obtain performance of the contract, Maier appealed to the GSA Board of Contract Appeals (GSBCA), contending that no contract existed. By letter of October 23, 1975, the Acting General Counsel of GSA requested our decision on the validity of the subject oral contracts.

In our decision, B-185177, March 1, 1976, we concluded that the action by Maier and GSA resulted in a series of oral contracts. The solicitation specified the manner of acceptance as follows:

"Telephone offers to purchase crude natural rubber will be received and considered each Government business day* * *.

* * * * *

"Each offeror will be advised by telephone of the acceptance or rejection of his offer as early as possible on the date the offer is received. Such telephone acceptance shall constitute notice of award. A confirming sales contract, will be mailed to each Purchaser for its execution and subsequent execution by GSA." (Emphasis added.)

Our earlier decision made reference to the fact that Robert P. Maier, Inc., accepted deliveries between January 18, 1973, and June 6, 1973, pursuant to a telephonic acceptance of October 4, 1972, although a confirmatory contract was not executed until September 18, 1973; also Maier accepted shipments between April 16 and May 4, 1973, pursuant to a telephonic acceptance of April 16, 1973, which was not executed in writing until April 23, 1973. From these facts, we concluded that there existed a course of conduct under which Maier accepted deliveries of rubber pursuant to oral contracts prior to the execution of a written confirmatory contract.

Maier contends that these facts are erroneous, alleging a failure to distinguish between Robert P. Maier, an individual (deceased), and Robert P. Maier, a corporation. However, the only sales referred to in our decision involved deliveries made after the January 1973 date of incorporation supplied by the protester itself. Consequently, we do not agree that the course of dealings cited in our decision failed to distinguish between Maier, an individual (deceased), and Maier, a corporation.

Maier also contends that we erred in stating "There is no indication, however, that the Government and the offeror did not intend to be bound by a telephonic acceptance, once given." Maier disputes this statement on the ground that it contested the existence of a contract when GSA raised the question of performance some 18 months after the telephonic exchange took place. However, the intention which is relevant to the existence of a valid and enforceable contract is that intention expressed at the time of the telephonic exchange. See Courtin v. Sharp, 280 F.2d 345 (5th Cir. 1960). The fact that Maier denied the existence of a contract 18 months after the Government accepted its offer is not controlling.

Maier also argues that our decision "failed to refer to the admitted errors in the memorandum (record) maintained by the

"Government of instant transactions." GSA admits that, in recording the sales of rubber, it broke down the larger sales into smaller units for the convenience of the purchaser in reselling the rubber. However, there is neither an indication by GSA, nor an allegation by Maier, that the Daily Record of Rubber Sales incorrectly reflects the date, quantity, delivery date, or price of rubber sold. Consequently, we are unaware of any error in GSA's Record which justifies a deviation from our earlier decision.

Maier has also requested our Office to reconsider our legal conclusion that an oral contract was sufficient to create a binding obligation on the parties. However, Maier has presented no persuasive legal authorities or precedents to show that our prior decision was based on an error of law. Accordingly, we will not reconsider our conclusion on this point.

Finally, Maier contends that the "GSA Board of Contract Appeals" and not this Office was the proper forum to decide the facts. It states that our prior decision was based on "the GSA version of the facts and an ex parte denial of the facts as presented by Maier."

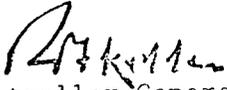
Insofar as the jurisdiction of the GSA Board of Contract Appeals is concerned, we were not requested by GSA to resolve a dispute of fact arising under any contract. Rather, as stated in our decision, the sole issue presented to us by GSA was the legal question of whether binding contracts were created as the result of a series of oral communications between Maier and the Government. 53 Comp. Gen. 167 (1973). Before deciding the question presented, we received written arguments from both parties to the dispute. It is true, of course, that we did not conduct a formal hearing, with discovery, testimony and cross-examination of witnesses. As we stated in Afghan Carpet Cleaners, B-175895, April 30, 1974, 74-1 CPD 220:

"Since our Office examines and settles claims solely on the basis of the written record before it, where that record is in conflict as to the facts, as in the instant case, we do not possess the authority of the courts to summon witnesses, administer oaths, and conduct oral examination to facilitate the resolution of such conflicts."

At the same time, our legal determinations are not binding on private parties who are free to challenge our findings in an appropriate judicial forum. Steinthal v. Seamans, 455 F.2d 1289, 1305 (D.C. Cir. 1971).

B-185177

For these reasons, our decision of March 1, 1976, is affirmed.


Deputy Comptroller General
of the United States